ANNUAL REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF MICHIGAN,

FOR THE YEAR 1839.

BY AUTHORITY.

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REPORT.

OFFICE OF ATTORNEY GENERAL,
Detroit, Dec. 28, 1839.

To the Legislature of the State of Michigan:

I have the honor herewith to submit an account of the official business performed by me, as Attorney General, since the date of my last annual report. It should perhaps, be stated here, that the annexed schedules exhibit only the general outlines of the proceedings which have been instituted, as it is believed that a minute detail of every act is neither contemplated by the provision which renders it the duty of the Attorney General to make an annual report, nor would it promote any beneficial purpose. All that is material, however, to show the nature of these proceedings has been set forth, and should any further particulars become necessary or desirable, they will most cheerfully be furnished.

Schedule A contains a statement of those cases in which the State is a party or directly interested, and as those are all civil proceedings, it will be proper to remark that the services which have been rendered in regard to criminal matters, have been confined almost entirely to assistance given by Prosecuting Attorneys whenever called on, and the cases therefore are properly included in these reports. Appended to this schedule will also be found an abstract of reports which have been received at this office from several receivers, showing the situation of the banks under injunction.

It was believed that something of this kind would be desirable for the purpose of showing the extent and importance of the interests involved in the proceedings which have been instituted at this office within the last two years against banks;

and the document has been made as complete as the returns received would permit.

From these statements it will be preceived that there are *forty-three* banks in this State, against which proceedings have been instituted to procure a dissolution of their corporate rights, and that thirty-four of these are owing to the public an aggregate indebtedness of more than *a million and a half.* It is also shown, indeed, that there are nominal assets in the hands of the receivers of these banks to an amount more than equal to their indebtedness. In order, however, to show the slight reliance that should be placed on these assets, it is hardly necessary to remark that of all demands, those which are due to an insolvent corporation are the most unlikely to be cheerfully paid by the debtor; and the most difficult to collect; and the most certain to be attended by protracted and expensive litigation; and when we take into account the fact which has become sufficiently *notorious* that most of these banks were engendered in fraud, and brought forth in direct and palpable violation of law, and in hostility to every sound principle of business or of banking, it can hardly be expected that the conversion of these assets into money, will either be very rapid or attended with great ultimate success. It is nevertheless hoped and believed that the several receivers are proceeding to enforce the collection of the demands in their hands with as much rapidity as the difficulties of the times and a prudent regard to the interests of the creditors will warrant, and the whole matter is submitted to the Legislature with the simple remark, that if any aid can be given by legislative action which will facilitate the collection of these demands and hasten the payment of this large indebtedness, it is most important that it should be done at the earliest moment.

The next schedule, marked B, is an abstract of the annual reports of the Prosecuting Attorneys of the counties of Monroe, Lenawee, Branch, Kalamazoo, Jackson, Ingham, Shiawassee, Genesee, and Oakland; no reports having been received from the Prosecuting Attorneys of the remaining counties.

Were these reports carefully prepared by the Prosecuting Attorneys of the different counties, and punctually transmitted to this office as required by law, much valuable information might be laid before the Legislature in regard to that most important branch of our government, the administration of the criminal law.

An abstract of such reports, if they were complete and perfect from every county in the State, would furnish unerring data, from which it could annually be seen by the assembled representatives of the people, whether crime was on the increase, or whether its withering and corrupting influence had been arrested and overpowered by the increasing virtue and morality of the people; and if the morals of the community were depreciating, if crime had become more rife and pervading, the information thus provided would afford the most convincing indications to show whether this effect resulted from errors in the law, or proceeded from the impurity or inefficiency of its administration.

As it is this year, with information from only about one-third of the counties, and those not the most populous in the State, it would be hardly proper or consistent to make the facts contained in these returns alone, the basis of material suggestions, as to such improvements or changes in the criminal law as are intended to operate over the whole State. Enough however, appears in these reports, which in connection with occurrences that have happened under my own observation, clearly indicate that some important additional legislation is required before the criminal jurisprudence of this State can be considered a complete and perfect system.

As there is no positive enactment of the Legislature of this State providing in distinct terms, that the *common law* shall be deemed and considered as a part of the law of this State, in reference to crimes and their punishment, it has become a matter of doubt, or at least of discussion with some, whether any offenses can be punished, except such as are particularly

defined and designated, and for which the penalties are prescribed by the Revised Statutes.

Difficulties have been started on this subject by members of the legal profession, which, if sustained by the Supreme Court, would greatly embarrass the prosecution of crime; and the subject having been particularly referred to by the efficient Prosecuting Attorney of the county of Monroe, in his annual report, I deem it my duty to present it to the consideration of the Legislature.

If there is any room for uncertainty in regard to this question, it cannot be obviated too soon, by the action of the legislative authorities, for nothing can present a more inconsistent and incongruous spectacle, than that of a community claiming to be free and enlightened, and professing to be governed by law, where there is room left for any citizen to remain in doubt as to what the law is, which designates the offenses and regulates the proceedings, in regard to crime.

Should this uncertainty be permitted to continue, the extent of the difficulties to which it will inevitably lead cannot well be foreseen; the delay of justice and the escape of the guilty are among the least of the evils which it will be likely to bring in its train. Worse than these, and more pernicious to the best interests of society, it will contribute more than anything else to poison the public mind with regard to the administration of justice, and beget suspicion as to the disinterestedness, purity, and firmness of those who minister at its altars.

It has been well said by an enlightened jurist and criminal lawyer, that whenever the law is so ambiguous or its definitions so loose as to render it doubtful whether one act or another comes within its intent, the chances of a decision in accordance with, or contrary to, the meaning and intention of the Legislature, are about equal, and it becomes, of course, as probable that the penalty may fall on the head of the innocent as of the guilty, and thus the innocent are made guilty, and the guilty become more depraved.

Effects of this description, when produced by ambiguity in the law, or any other case, may well excite suspicion, as to the integrity and uprightness of those concerned in the administration of justice; and when such suspicion becomes general, when the public mind becomes impressed with the belief that the scales of justice are not held with an exact and even hand, the purity of the public morals, the harmony and happiness of social intercourse, and the sanctity of individual rights, and privileges, are all in most imminent danger, and imperiously call upon an enlightened legislature to arrest and if possible, remove the evil.

Whether it were best and preferable, all things considered, for the Legislature to adopt a *code* of *written law* in which every offense should be clearly and fully defined, and the forms and mode of prosecution exhibited as in a mirror, to the vision and comprehension of every citizen, so that all should feel the force and admit the propriety of the maxim, that "ignorance of the law excuseth no one;" whether the adoption of that great body of *unwritten* or common law, pronounced by Chancellor Kent to be a code of matured ethics and enlarged wisdom, admirably adapted to promote and secure the freedom and happiness of social life, would most conduce to the interest of the commonwealth, is a subject much too extended for present discussion.

But surely if there is any room for doubt as to whether the common law is the law of this State in regard to all criminal offenses not expressly defined and provided for in the revised statutes, it is of paramount importance that this uncertainty should be effectually remedied, either by a declaratory enactment establishing the common law, as the standard in all cases where the offenses are not especially regulated by statute, and prescribing the different grades of punishment, or that such additions should be made to the criminal code of the State, as would make it a complete and harmonious system in itself, without leaving anything to be decided by the principles of the common law.

It is not supposed that the learned reviser, who prepared our present criminal code, desired in the least to do away entirely with the common law as applicable to crimes and their punishment; on the contrary, that its salutary regulations and restraints were clearly intended to be continued of force as a point of our criminal system, is fully evident from the fact, that punishments are prescribed in several instances for offenses not contained in the revision, and which are referred to as existing at common law, in contradistinction to those offenses provided for by statute; and this is also further corroberated, by the fact that the portion of the revised statutes relating to criminal offenses is manifestly incomplete, as a whole code, as it contains no provision whatever in regard to a large number of the most ordinary and common offenses. Assault and battery, barratry, and conspiracy are instances of this kind, there being no statutory provision making them criminal, and it is not to be supposed that a code could be esteemed complete and perfect, without embracing and providing for offenses so injurious to the interests and peace of society, and of such frequent occurrence.

From this view of the subject, it may perhaps, be thought and said by some, that there is no room for doubt; that the frequent and distinct recognitions of the common law in the revised statutes, afford such clear and conclusive indications of what were intended by the Legislature, that there is no ground whatever on which to found an argument going to sustain or establish the position that the common law is not now of full force and effect, as the criminal law of this State in all cases not especially provided for by statute. But even admitting that such is the better opinion, I would still urge that it does not silence discussion; it does not prevent the question from being raised, to defeat if possible, the conviction of a criminal, nor avoid the consequent delay; and it is undoubtedly a sound principle that a matter so vitally important to the dearest interests of society, should not be left solely to the construction of courts; but should be so regulated and established

by statute, in such *plain* and *intelligible language,* that the most ignorent could not be left in doubt as to what constituted a criminal offense.

Another subject to which I would respectfully invite the attention of the Legislature, as materially connected with the "*proper and economical administration* of the criminal law of the State," is the passage of a law enabling the prosecuting attorneys of each county to issue subpœnas and enforce the attendance of witnesses upon a criminal prosecution from any part of the State, and giving the circuit courts of each county the necessary additional jurisdiction for that purpose. A striking illustration of the difficulties attending the prosecution of criminals, may be found in the fact, that while the Constitution of the State provides that every criminal shall have the privilege "to be confronted with the witnesses against him, and of compulsory process for obtaining witnesses in his favor," yet by our statutes, neither the prosecution nor the criminal are provided with any means of enforcing the attendance of witnesses who happen to be out of the county where the trial is to take place; for the jurisdiction of each circuit court is confined to its proper county; and even if a subpœna could be served out of the limits of a county, still if the witness refuses to come, the court have no power to compel his attendance, as an attachment or warrant for the contempt could only be served within the county where the court had jurisdiction.

As a consequence of this it follows, that if a murder should be committed in the county of Wayne, and there was a living witness of the fact in the county of Washtenaw, his testimony could not be procured on the trial, unless the witness voluntarily attended on being served with a subpœna; thus a murderer might escape, and justice be defrauded of its dues, as the law now stands, although positive evidence of guilt might under other circumstances be obtained from an adjoining county. It will not need any argument, I apprehend, to show the necessity or propriety of the provision which has been sug-

gested; as it must be apparent to every one, that justice in regard to criminals can hardly be executed, whilst the public prosecution is compelled to rely for testimony upon the voluntary attendance of witnesses, without compensation, or confine himself to such as may be compelled to attend from within the county.

The same remarks are applicable to the issuing of process for the arrest of a criminal after an indictment has been found by a grand jury. There is no specific provision of law authorizing the circuit court of any county to issue a bench warrant for the arrest of an offender who has been indicted, which shall continue its force and warrant an arrest beyond the boundaries of the county; and if there is any such power, it certainly must be derived "*ex necessitate rei*;" but it would surely seem that the necessity for enforcing the jurisdiction of such a court must cease entirely when you passed the statutory limits which confined its jurisdiction. If this is correct, the only basis upon which this most necessary proceeding rests, is at once destroyed; and the only means left to the prosecuting officer to enforce the execution of the criminal law against persons indicted before arrest, is to cause them to be arrested if they are kind enough to remain within the county, or come there, and thus afford an opportunity for their being taken.

The evils which may result from these sources are not as yet merely in imagination; on the contrary they have already assumed a practical character, and have been both seen and felt by those concerned in the execution of the criminal law, sufficiently to be appreciated; and it need hardly be urged that powers so vitally essential to the proper and energetic enforcement of the penalties against crime, should never be left open for doubt and dispute, or be made to depend entirely upon construction.

Another difficulty attending the execution of the criminal law of this State, is to be found in the fact that no mode is pointed out in the revised statutes for a public prosecutor by excepting to a decision, at circuit, deemed to be erroneous, to obtain a review or rehearing in the Supreme Court.

The hasty decisions necessarily made in the progress of a trial at circuit, render it quite probable that the must profound and enlightened judges may error in their opinions, and it is believed that no sufficient reasons can be given why such erroneous decisions are not as likely to be made against the prosecution in a criminal trial as in its favor. If such is the fact, and decisions are sometimes made which have the effect to save a criminal from merited punishment when justice would demand his conviction, surely there should be some mode in which the error could be corrected, and it would appear reasonable and proper, that this mode should be as simple as possible, and be fully regulated by statutes, so that whilst it secured to the public prosecutor an opportunity for obtaining a review of a decision deemed erroneous, it should not compromit or mitiate against the just rights of an individual charged with a criminal offense.

By the present law, the defendant in any criminal proceeding who considers himself injured by any decision of the court during his trial, may obtain a rehearing upon the point, either by motion for new trial, bill of exceptions, case reserved, or writ of error; and it is contended, that by confining this right solely to the defendant, the revised statutes necessarily preclude the exercise of a similar right by the public prosecutor; a simple provision, therefore, giving the Prosecuting Attorney, under proper limitations, similar rights to those which are extended to the convicted defendant, is all that is necessary.

In accordance with the provisions of law, I have deemed it my duty to accompany the abstract of the annual reports of the several Prosecuting Attorneys with the preceding statements and observations, and they are respectfully submitted to the Legislature for such action as they, in their wisdom shall deem advisable and proper.

PETER MOREY,
Attorney General.

For appendix see Senate Documents, 1840, Michigan State Library.